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Group-Washington

November 30, 1995

Mr. William F. Caton
Acting Chief
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

Re: *WT Docket No. 95-157, RM-8643-Amendment to te Comission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*

On behalf of Pacific Bell Mobile Services, please find enclosed an original and six copies of its *"Comments"* in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation | ) ) ) ) | WT Docket No. 95-157 RM-8643 |



# COMMENTS OF PACIFIC BELL MOBILE SERVICES

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Date: November 30, 1995

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## SUMMARY

Pacific Bell Mobile Services initiated the Commission's consideration of a microwave cost sharing plan by filing a Petition for Rulemaking earlier this year. We are very pleased with the Notice of Proposed Rulemaking and urge speedy adoption of the cost sharing proposal. Adoption of a cost sharing proposal will support one the Commission's objectives in providing a regulatory structure for PCS, "speed of deployment."[1]

We offer some minor modifications to the cost sharing proposal that will promote ease of administration. We recommend tying the $T_I$ and $T_N$ dates in the formula to the prior coordination notice. These are easily confirmed dates that are related to the time that a PCS licensee plans to initiate service. Consequently, we recommend that $T_I$ be 60 days from the date that the relocator sends outs its prior coordination notice and that $T_N$ be 60 days from the date that a subsequent PCS provider issues its prior coordination notice. We support the Commission's recommendation of reimbursement rights as opposed to interference rights.

In addition to the cost sharing plan, the Commission has acknowledged that some modifications to the microwave relocation rules may be required. We strongly agree. We have encountered difficulties with some microwave incumbents who seek to use the microwave relocation process as a source of revenue. In order to encourage the incumbents to negotiate reasonably during the voluntary period, we strongly urge that the definition of comparable facilities be reduced in the mandatory period to depreciated value or provision of uninstalled equipment whichever the incumbent chooses. Under the current rules there is little incentive to negotiate in the voluntary or mandatory periods, since in an involuntary relocation, the incumbent is still entitled to have a comparable system designed, installed and tested at no cost to the incumbent. To facilitate the relocation process, some of the rules need to be modified to deter excessive demands and delaying tactics by some incumbents. The regulatory process needs to move quickly on these issues also.

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[1] In the Matter of Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, Second Report and Order, 8 FCC Rcd 7700, para. 5 (1993).

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# COMMENTS OF PACIFIC BELL MOBILE SERVICES

## I. INTRODUCTION.

We are very pleased that the Commission has released a Notice of Proposed Rulemaking on the Petition for Rulemaking regarding the sharing of microwave relocation costs that we filed on May 5, 1995.[1] As the Commission has recognized, the relocation of microwave incumbents is a very significant issue for PCS licensees. The process is a time consuming one that requires extensive financial and technical resources. A cost sharing rule will help the process to move faster and more efficiently and will benefit both the microwave incumbents and the PCS licensees. In addition, the Commission has raised some critical other issues with regard to microwave relocation, such as the definition of "good faith negotiations" and "comparable facilities." We applaud the Commission's recognition that other aspects of the relocation process also need to be clarified to maintain the Commission's goal of relocating the incumbents in an efficient and equitable manner. Finally, we urge the Commission to issue its decision in this rulemaking as quickly as possible.

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[1] Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, RM-8643, Notice of Proposed Rulemaking, released October 13, 1995, ("NPRM").

## II. THE COST SHARING PROPOSAL CONTAINED IN THE NPRM SHOULD BE ADOPTED WITH SOME MINOR MODIFICATIONS.

### A. Determining The Date Depreciation Begins.

The Commission notes that in the formula to determine the amount paid to the relocator, we proposed that $T_1$ be the date the relocator acquired the interference rights.[2] We then agreed to the industry proposal outlined in Personal Communications Industry Association ("PCIA's") comments that $T_1$ be the date that the relocator placed its system in service. The Commission suggests that our original proposal is preferable because it is an easy date to confirm.[3] However, the Commission also requests comment on whether a single date such as the month in which the voluntary negotiation period began be used for $T_1$ since a uniform date would make the formula easier from an administrative perspective.[4]

We oppose a uniform date. It would unfairly penalize the relocator that relocates the link significantly after the uniform date. The amount subject to reimbursement would be reduced through depreciation even though the relocator received no benefit during the time between the uniform date and the time of the relocation. However, we share the Commission's desire to use an easily identifiable date. We offer the following refinement on our earlier proposal. $T_1$ should be 60 days from the date that the relocator sends out its prior coordination notice. This date is a definite one and it is also reasonably close to the time a PCS provider would be offering service. Thus, it will start depreciation closer to the time that the relocator actually benefits from the relocation. Moreover, it is the only notification required prior to system operation since individual transmitters are not licensed in the PCS service.

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[2] NPRM, para. 30.

[3] Id.

[4] Id. at para. 31.

## B. Compensable Costs.

The factor C in the formula equals the amount actually paid to relocate the link. The Commission notes that we advocated not separating out direct costs of relocation from premium payments in order to avoid controversial determinations, but that PCIA asserted that only actual relocation costs should be eligible for reimbursement.[5] An integral part of our proposal is the use of cost categories as a way to avoid disputes over what should be included in C.[6] If a relocator's costs fits in those categories, the cost is entitled to be included in C. If a cost does not, it is not subject to the reimbursement formula.

The Commission lists a series of cost categories and proposes to limit reimbursable costs to those categories.[7] We agree completely.

The Commission then requests whether it should allow premium costs to be included in the cost-sharing equation, but subject them to an accelerated depreciation schedule that reduces them to zero at the end of the voluntary period.[8] This would make the cost sharing formula much more difficult to use and would lead to disputes over what constitutes a premium. We strongly oppose this modification. The use of cost categories discussed above is equitable and easy to administer. Compensable costs should be determined on that basis.

## C. Date Which Begins Cost Sharing Obligation.

The Commission tentatively concludes that PCS licensees should be permitted to seek reimbursement for any relocation costs incurred after the voluntary negotiation period began for A and B block licensees on April 5, 1995.[9] We agree that this is an appropriate date. The relocation of microwave incumbents is already underway. It would be unfair to penalize those

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[5] Id. at para. 36.

[6] Petition for Rulemaking, Appendix B.

[7] NPRM, para. 37.

[8] Id.

[9] Id. at para. 35.

licensees that moved quickly with an effective date that would prevent them from obtaining any reimbursement from subsequent licensees.

### D. Length of Cost Sharing Obligation.

The Commission proposes that the cost sharing plan would sunset for all PCS licensees on April 4, 2005.[10] We agree with this time frame, provided that the Commission makes clear that any subsequent licensees that are paying their portion of relocation costs on an installment basis must continue the payments until the obligation is satisfied.

### E. Reimbursement Rights.

Originally, our proposal as well as PCIA's industry consensus contained the concept of interference rights. The Commission has modified this aspect of the plan and recommended that establishment of "reimbursement rights" which would easily co-exist with an active microwave authorization and thus avoid any necessity for Commission approval of the transfer of a right relating to a license.[11]

We agree that the establishment of a reimbursement right that is created on the date that the PCS licensee submits a relocation agreement to the clearinghouse will be easier to administer since Commission approval is not required. Therefore, it is an improvement upon the concept of interference rights.

The establishment of the reimbursement right should be enforceable. If subsequent PCS licensees fail to meet their cost sharing obligation, the relocator has the option under Section 207[12] to file a claim for damages at the Commission or in federal district court. Any complaints made to the Commission should be swiftly processed to discourage any attempts by subsequent licensees to avoid their obligation.

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[10] Id. at para. 39.

[11] Id. at para. 47.

[12] 47 USC §207.

## F. Definition of Interference.

The Commission proposes that TIA Bulletin 10-F is the appropriate standard for determining interference for purposes of the cost sharing plan.[13] We support the use of Bulletin 10. However, the document continues to evolve and we recommend that the Commission rules indicate that the interference should be determined based on the most recent version of Bulletin 10.

## G. Co-channel vs. Adjacent Channel Interference.

Although we originally supported reimbursement to adjacent channel interference as well as co-channel interference, in our comments we agreed with the PCIA proposal. The PCIA proposal limits the obligation to contribute to the relocations to subsequent licensees that would have caused co-channel interference to the link that was relocated and at least one endpoint of the former link was located within the subsequent licensee's market area.[14] We agree that limiting the cost sharing obligation to co-channel interference makes the cost sharing program easier to administer and we support it. However, the Commission should make clear that the co-channel interference limitation relates only to the cost sharing obligation. All PCS licensees remain obligated not to cause harmful interference to any microwave incumbent. This applies equally to co-channel and adjacent channel interference.

## H. Installment Payments.

The Commission has tentatively concluded that PCS licensees who are allowed to pay for their licensees in installment payments under the designated entity rules and UTAM be permitted to make installment payments under the cost sharing plan.[15] We support this with one caveat. UTAM should not be provided with a reduced interest rate. Rather its financing should be

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[13] NPRM, para. 52.

[14] Id. at para. 55.

[15] NPRM, para. 61.

done at its underlying cost of funds. UTAM is composed of major manufacturers that should have no difficulty finding financing.

## I. Timing of Payment.

The Commission proposes that a subsequent PCS licensee be required to pay under the cost-sharing formula at the time its operations would have caused interference with the relocated link.[16] This is consistent with our original proposal. The Commission notes that BellSouth recommends that fulfillment of the cost-sharing obligation should be treated as part of the frequency coordination process and that licensees should not be permitted to initiate service until their payments are made in full.[17]

To remove any uncertainty regarding when a service is placed in operation we recommend a refinement to our original proposal. The payment obligation should arise 60 days after the subsequent PCS provider issues its Prior Coordination Notice. The advantage of this date over our original proposal is that it is a definite date that is easy to confirm. Our original proposal may have led to disputes about when service was initiated.

## J. The Cost Sharing Formula vs. Alternative Agreements.

We indicated in a Petition for Rulemaking that the formula should only create an upper limit on reimbursement and that parties should remain eligible to negotiate alternative agreements among themselves.[18] Parties should also be permitted to negotiate cost sharing agreements in excess of the formula. We are pleased that the Commission has emphasized this flexibility in its NPRM.[19] The clearinghouse should be notified of any such agreement and the links affected. If the parties to the agreement seek reimbursement from other PCS providers not subject to the agreement, all relevant information must be provided to the clearinghouse.

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[16] Id. at para. 58.

[17] Id. at para. 57.

[18] Petition for Rulemaking, p. 10.

[19] NPRM, para. 29.

## III. ADDITIONAL GUIDELINES NEED TO BE ISSUED TO ENSURE THAT MICROWAVE RELOCATION IS EQUITABLE FOR BOTH THE MICROWAVE INCUMBENTS AND THE PCS LICENSEES.

As the Commission is now aware from ex parte visits by PCIA and some PCS licensees including us, some of the microwave incumbents have sought to exploit the current rules in order to use microwave relocation as a profit center rather than working to obtain a smooth and equitable relocation. PCIA's comments include specific examples of demands by incumbents that seek to exploit the rules to make a profit on relocation. In order to deter egregious behavior the Commission has made several proposals.

### A. Requirement For Two Independent Cost Estimates.

One proposal is that the Commission require two independent cost estimates, prepared by third parties not associated or otherwise affiliated with either the incumbent licensee or the PCS provider be filed with the Commission by parties that have not reached an agreement within one year from the commencement of the voluntary period.[20] We strongly support this proposal. Costs for the estimates should be shared equally between the relocator and the incumbent. Independent cost estimates should facilitate negotiations in the remaining voluntary period and the mandatory period.

### B. Definition of Comparable Facilities.

The Commission proposes to clarify the factors it will use to determine whether a facility is comparable. The three main factors would be communications throughput, system reliability, and operating cost.[21] We agree with the Commission's focus on those three factors in the voluntary period.

As a part of operating cost, however, the Commission proposes that any recurring costs as a result of the relocation be limited to a single ten-year license term. We disagree. A

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[20] NPRM, para. 78.

[21] Id. at para. 73.

microwave license is for a five year period. Consequently, the obligation to compensate for increased recurring costs should be limited to five years from the date the incumbent begins its service at its relocated frequency or alternative facilities.

The Commission proposes that comparable facilities would not include extraneous expenses such as fees for attorneys and consultants.[22] We agree completely. There should be no recovery of extraneous expenses.

The Commission proposes that in those cases in which analog equipment is not readily available, comparable facilities would consist of the lowest-cost digital system that satisfied the technical requirements of the guidelines.[23] We agree but would reserve the right to substitute vendors to achieve the most economical solution.

In the alternative, the Commission requests comment on whether depreciation should be taken into account.[24] Comparable facilities in the voluntary period should consist of replacing the microwave incumbent's system with a system of equivalent operating characteristics based on the factors of throughput, system reliability and operating cost. However, the definition of comparable should change in the mandatory period to encourage negotiations in the voluntary period.

In the mandatory period, depreciation should be taken into account in the following manner. Microwave incumbents should have a choice of receiving a cash payment equivalent to the depreciated value of their system based on 10 year straight line depreciation or the provision of uninstalled equipment consisting of comparable radios, antennas, transmission lines and a frequency study. Since in either case, the incumbent will be building and testing the new system, the 12 month test period should be eliminated. There is no reason to require the PCS licensees to have any responsibility for the performance of a system they did not construct. This change will

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[22] Id. at para. 76.

[23] Id. at para. 77.

[24] Id.

encourage incumbents to negotiate in good faith in the voluntary period and should eliminate the unreasonable demands made by some incumbents.

For those incumbents that were not approached by a PCS licensee during the voluntary period, and thus had no opportunity to negotiate for replacement value, the following exception should apply. Incumbents that fall into this category should be give 6 months from the time they were contacted by a PCS licensee in which to negotiate for a system of equivalent operating characteristics. At the end of the six months, the definition of comparable becomes depreciated value or the uninstalled equipment option described above. PCS licenses have paid significant amounts of money for their licenses. It is critical for them to put their PCS systems in service quickly. There is little incentive for them to wait until the voluntary period in order to take advantage of the reduced definition of comparable value. Consequently, the incumbents should not be disadvantaged by this proposal.

### C. Good Faith Requirement.

The Commission proposes to clarify the term "good faith."[25] An offer by a PCS licensee to replace a microwave incumbent's system with comparable facilities ... would constitute a 'good faith' offer. Likewise, an incumbent that accepts such an offer presumably would be acting in good faith, whereas failure to accept an offer of comparable facilities would create a rebuttable presumption that the incumbent is not acting in good faith."[26] We strongly support this clarification.

The Commission requests comment on the appropriate penalty to impose on a licensee that does not act in good faith. We recommend that when a finding is made that the microwave incumbent is not acting in good faith in the mandatory period, that incumbent should immediately be converted to involuntary relocation, and declared to be in secondary status without

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[25] Id. at para. 69.

[26] Id.

any compensation. This recommendation is based on a change in the compensation required during the involuntary period which is explained in greater detail in the following.

The current standard for an involuntary relocation requires the PCS licensee to do the following:

1 Guarantee payment of all costs of relocating the incumbent to a comparable facility. Relocation costs include all engineering, equipment, site costs, and FCC costs, as well as any reasonable additional costs.

2 Complete all activities necessary for placing the new facilities into operation, including engineering and frequency coordination.

3 Build and test the new microwave or alternative system.[27]

There are two serious problems with imposing this standard on an involuntary relocation. One, it provides no incentive for the microwave incumbent to negotiate in good faith since the very worst outcome is that he gets a comparable system designed and built for him at no cost. Two, if the parties have failed to reach an agreement in the voluntary period and the mandatory period, the parties are highly likely to be in an adversarial relocation that makes the requirement to build and test the system potentially impractical. It is possible that the incumbent may limit access to his property and may interfere with the placement of a new system.

For these reasons, we propose that when the mandatory period has expired or the microwave incumbent has been found to be acting in bad faith by rejecting an offer of comparable facilities, the incumbent convert to secondary status.

Again, the purpose of these proposed changes is to encourage reasonable requests during the voluntary period. We are committed to a fast and orderly relocation process and the provision of comparable facilities. At the same time we want to avoid being held hostage by an unreasonable incumbent who can simply wait for an involuntary relocation and not suffer any serious consequences.

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[27] Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589, para. 5 (1993).

## D. Public Safety Certification.

Under the current rules, licensees involved in public safety and emergency services receive an extended period of relocation.[28] The Commission has proposed that to be eligible for the extended period of relocation the public safety licensee must establish: 1) that it is eligible in the Police Radio, Fire Radio, or Emergency Medical, or Special Emergency Services, 2) that it is a licensee in one or more of these services, and 3) demonstrate that a majority of communications carried on the facilities involve safety of life and property.

We agree with this proposal but recommend the following. In establishing that a majority of its communications involve the safety of life and property the Commission should look at the capacity of the licensee based on the initial channel loading contained in the incumbent's Form 402 application. For example, if the licensee's initial channel loading is for 100 channels, he would only qualify for extended relocation if 51 of those channels carried communications involving the safety of life or property. This is a reasonable way of establishing that a majority of the communications are related to public safety.

## E. Twelve Month Trial Period.

The existing rule provides for a twelve month period for relocated incumbents to test their new facilities.[29] The Commission proposes to clarify the rules so that a microwave incumbent may surrender its license as part of a relocation agreement without prejudice to its rights under the relocation rules.[30] We agree with this proposal. We also agree with the proposal that the twelve month period would begin to run from the time that the microwave licensee commences operations of its new system.[31]

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[28] 47 CFR §94.59(f).

[29] 47 CFR §94.59(e).

[30] NPRM, para. 85.

[31] Id. at para. 84.

We have an additional change to propose. Under the current rules, if the new facility is not found to be comparable during the test period, the PCS licensee must "remedy the defects or pay to relocate the microwave incumbent back to its former or equivalent 2 GHz frequency."[32] The latter two options should be removed because as a practical matter they are of little use. Finding an equivalent 2 GHz frequency would be virtually impossible, and returning the licensee to its original frequency is impractical. The PCS licensee should have an obligation to cure the problem. Again, we want to emphasize that under our proposal the twelve month trial period only applies to those systems designed and built by the PCS licensees. For example, if an incumbent accepts a cash payment, he is responsible for his system from that point on.

### F. Interim Licensing.

The Commission states that it will grant primary status for only a limited number of technical changes for the microwave incumbents.[33] All other modifications will be permitted only on a secondary basis, unless a special showing of need justifies primary status and the incumbent is able to establish that the modification would not add to the relocation costs of the PCS licensees.[34] These frequency bands have been sold. Some microwave incumbents may attempt to make minor adjustments to their systems so that they will be susceptible to interference from a PCS provider to be eligible for relocation. We urge the Commission to not license any modifications on a primary basis.

### G. Secondary Status After 10 Years.

The Commission proposes that microwave incumbents that are still operating in the 1850-1990 MHz band on April 4, 2005 be made secondary on that date.[35] We recommend as an alternative that the Commission only accept renewals for primary status up to April 4, 1996. After

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[32] 47 CFR §94.59(c) (emphasis added).

[33] NPRM, para. 86.

[34] Id.

[35] Id. at para. 99.

that date, all renewals would be on a secondary basis. License terms for the microwave incumbents are for five years, so all renewals processed prior to that date would allow the incumbents to retain primary status for five more years. As the Commission notes, private operational fixed microwave stations in the 12 GHz band had 5 years to relocate their facilities after which time they become secondary to Direct Broadcast Satellite Service.[36] There is no reason to give the microwave incumbents in the PCS bands an additional five years.[37]

## IV. CONCLUSION.

We commend the Commission on its active role in promoting the microwave relocation. Adoption of a cost sharing plan will facilitate that process and we urge its speedy adoption. But as the Commission has recognized, other clarifications and modifications to the rules are necessary to ensure that microwave relocation takes place in a manner that is equitable to both the PCS licensees and the microwave incumbents.

The ultimate goal should be to achieve a smooth transition in a way that ensures that incumbents are not disadvantaged by the relocation. This goal can be achieved through the Commission's proposals as modified in our comments. The only way an incumbent could be disadvantaged is if he or she declines the advantages of negotiating during the voluntary period

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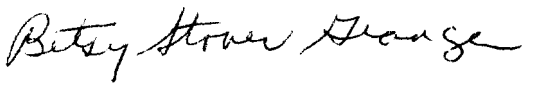
[36] Id.

[37] This time period is not related to the 10 year cost sharing period. The cost sharing period obligates any PCS licensee that benefits from a prior relocation to share in the cost. When secondary status occurs is an entirely separate issue. There is no need to have consistent time periods for both.

and/or negotiates in bad faith. It is reasonable to attach a penalty to such action. We respectfully request that the Commission adopt the proposals in the above because it will discourage inappropriate behavior in the negotiations and will facilitate fast and equitable relocation.

Respectfully submitted,

PACIFIC BELL MOBILE SERVICES



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